

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)	
)	
Implementation of Infrastructure Sharing)	CC Docket No. 96-237
Provisions in the Telecommunications)	
Act of 1996)	

BELLSOUTH OPPOSITION

BellSouth Corporation ("BellSouth") on behalf of its subsidiaries and affiliates, hereby submits these comments in opposition to MCI's Petition for Reconsideration of the Commission's *Report and Order* in the above referenced proceeding.¹

In its Petition, MCI reprises an argument the Commission rejected in the *Report and Order*. Specifically, MCI again asks the Commission to interpret the "fully benefit" provision of Section 259(b)(4)² of the Communications Act³ to require local exchange carriers ("LECs") sharing infrastructure with qualifying LECs ("QLECs") to price the shared infrastructure at no greater than average incremental cost, exclusive of joint and common cost. MCI's Petition is deficient in the first instance in that it assumes without support that the Commission has authority to grant the relief requested -- an issue the Commission expressly refrained from addressing in the

¹ *Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-237, *Report and Order*, FCC 97-36 (rel. Feb. 7, 1997) ("*Report and Order*").

² 47 U.S.C. § 259(b)(4).

³ Communications Act of 1934, as amended, 47 U.S.C. §§ 151 *et seq.*

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Report and Order. Beyond that, MCI has presented no new argument to support its contention. Accordingly, its Petition must be rejected.

I. MCI Has Failed to Address A Predicate Issue Necessary For The Relief It Seeks.

MCI's Petition is built upon MCI's assumption that the Commission has authority to establish the pricing requirements MCI advocates. The Commission, however, has expressly refrained from concluding that it has any authority to establish pricing requirements pursuant to Section 259. MCI has not asked the Commission to revisit this issue. Instead, MCI has simply bypassed the issue and asked the Commission to exercise authority the Commission itself has not concluded it possesses. Because MCI has failed to provide any argument supporting the *existence* of the Commission's pricing authority, MCI's arguments urging the *exercise* of authority have no foundation. Accordingly, MCI's Petition should be rejected.

MCI's error stems from a misreading of the discussion in the *Report and Order* regarding whether the Commission has any pricing authority under Section 259. Based on its misreading, MCI misstates when it asserts that "the Commission reserve[d], but decline[d] to exercise, authority to establish pricing guidelines."⁴ Rather than reserving *authority* to establish pricing guidelines, the *Report and Order* makes clear that the Commission "reserve[d] the *question* of pricing authority."⁵ Indeed, at most, the Commission suggested only that it "*may* have the authority to establish pricing guidelines," but again saw "no[] need to address *that issue* at this time."⁶

⁴ MCI Petition at 1.

⁵ *Report and Order* at ¶ 116 (emphasis added).

⁶ *Report and Order* at ¶ 115 (emphasis added).

MCI has not asked the Commission to address that issue, nor has it provided any argument supporting a finding of the requisite authority.⁷ Instead, MCI simply, albeit repeatedly, asks the Commission to exercise authority that MCI has not demonstrated exists.

Rather than assuming the Commission to have such authority, the proper course would have been for MCI to ask the Commission to reconsider its decision not to address the issue. Parties then would have had an opportunity to respond to whatever substantive theories MCI believes support a finding of pricing authority. Instead, parties responding to MCI's present petition are limited to making procedural arguments and debating only whether the Commission should exercise authority, not the predicate issue of whether the Commission has the authority.

Nor can MCI cure the defects of its Petition by espousing its theories in reply comments. Such a tactic would deprive commenting parties of the opportunity to address the merits of whatever substantive argument MCI musters to support a finding of authority. MCI's misreading of the *First Report and Order* and its failure to raise this issue in its Petition should not inure to the detriment of opposing parties. Accordingly, MCI's Petition must be dismissed.

II. Even If The Commission Has Pricing Authority, MCI Has Presented No New Argument To Warrant The Exercise Of That Authority.

In a two-step argument, MCI first contends that, absent pricing intervention by the Commission, negotiations between a providing LEC ("PLEC") and a QLEC are not likely to produce infrastructure sharing agreements under which the QLEC "fully benefits" from the scale and scope economies of the PLEC as required by Section 259(b)(4). MCI then contends that the only price at which this statutory standard can be met is "average incremental cost, exclusive of

⁷ As the Commission observed in the *Report and Order*, several parties, including BellSouth, submitted argument that Section 259 does *not* confer on the Commission authority to promulgate pricing rules. *Report and Order* at ¶ 114.

joint and common costs.”⁸ MCI’s contentions were erroneous the first time the Commission rejected them in the *Report and Order*, and MCI has added nothing to bolster their viability in its Petition. Accordingly, the Petition should be rejected.

MCI’s assertion that negotiations are inadequate for purposes of Section 259(b)(4) rests on its own unsubstantiated lack of faith in the bargaining process between noncompeting entities of different sizes. Such lack of faith, however, hardly constitutes grounds for reconsideration.

Nor is MCI’s lack of faith shared by the Commission. The Commission has expressly considered whether pricing regulations should be super-imposed on the negotiation process in light of size or other alleged disparities between PLECs and QLECs and concluded they should not:

We conclude that, because Section 259 requires that a qualifying carrier not use infrastructure obtained pursuant to a Section 259 agreement to compete with the providing incumbent LEC, and as stated above, a providing incumbent LEC may recover all the costs it incurs as a result of providing shared infrastructure pursuant to a Section 259 agreement, parties will be able to negotiate agreements beneficial to both, in accordance with the goals of Section 259. In these circumstances, an incumbent LEC that receives from a qualifying carrier a request to share infrastructure under Section 259 does not face the same incentives to charge excessive prices or to set other unreasonable conditions for the use of its infrastructure that arise in the competitive situations in which Section 251 applies. Moreover, in the specific circumstances in which Section 259 applies, we believe that the unequal bargaining power between qualifying carriers, including new entrants, and providing incumbent LECs is less relevant than it is in the more general competitive situation since the incumbent LEC has less incentive to exploit any inequality for the sake of competitive advantage.⁹

⁸ MCI Petition at 6.

⁹ *Report and Order* at ¶ 116.

The Commission's conclusions also are amply supported by the record, which the Commission cites.¹⁰ As the Commission observed, "with the exception of MCI and, to some extent, ALTS, commenting parties from industry . . . are of the general view that appropriate terms and conditions, including compensation of the providing LEC by the qualifying carrier, will result from negotiations among the parties to infrastructure sharing agreements."¹¹ Among the parties the Commission identified as supporting this proposition was the Rural Telephone Coalition, whose members are expected to be the primary beneficiaries of the infrastructure sharing opportunities created by Section 259.¹² MCI has presented no grounds for reconsideration of this prior determination.

Beyond its failure to provide any reason for the Commission not to rely on negotiated agreements between PLECs and QLECs, MCI also proposes a pricing standard that is inconsistent with the express provision of Section 259. Section 259(b)(1) prohibits the Commission from requiring PLECs to take any action that is "economically unreasonable."¹³ Section 259(b)(4) requires the Commission to ensure that the terms and conditions of negotiated agreements are "just and reasonable."¹⁴ MCI's proposal would gut these requirements of any meaning.

¹⁰ See, e.g., *Report and Order* at ¶ 113 and n.290.

¹¹ *Report and Order* at ¶ 113.

¹² *Report and Order* at n.290, quoting RTC Comments at 11 ("[T]he Commission should not institute pricing rules when there is no indication that they are needed and the appropriate price will depend on the facts and circumstances of the negotiated agreement").

¹³ 47 U.S.C. § 259(b)(1).

¹⁴ 47 U.S.C. § 259(b)(4).

The effect of MCI's pricing standard would be to deprive PLECs of any share of the benefit of a negotiated agreement. Instead, PLECs would be obligated to transfer the entire benefit of their economies of scope and scale associated with the shared infrastructure to QLECs.¹⁵ Such a confiscatory requirement would not meet the tests of Sections 259(b)(1) and (b)(4).

A QLEC may fully benefit from the just and reasonable terms of a negotiated agreement without being the *sole* beneficiary of the agreement. Indeed, a QLEC fully benefits from the economies of scope and scale of a PLEC when it obtains infrastructure under a sharing arrangement at prices lower than it would achieve if it obtained infrastructure on a stand-alone basis, notwithstanding that the PLEC may also realize some benefit from the arrangement. To conclude otherwise, *i.e.*, that only QLECs are entitled to the benefits of the negotiated agreement, would contradict the whole notion of "just and reasonable" terms and violate the Commission's duty to "establish conditions that promote cooperation" between PLECs and QLECs.¹⁶ MCI's Petition should be denied.

¹⁵ See MCI Petition at 3 ("PLECs should *not* benefit from economies of scale and scope in its [sic] relation with the QLEC.") (emphasis in original).

¹⁶ 47 U.S.C. § 259(b)(5).

CONCLUSION

For the reasons set forth above, the Commission should deny MCI's Petition for Reconsideration.

Respectfully submitted,

BELLSOUTH CORPORATION



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DATE: April 30, 1997

CERTIFICATE OF SERVICE

I hereby certify that I have on this 30th day of April, 1997 served the following parties to this action with a copy of the foregoing **BELLSOUTH OPPOSITION** by placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the parties listed on the attached service list.


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928 310th Street NE Stanwood, WA 98292

To: FCC
From: Susan Tarwater
Date: April 21, 1997
RE: Formal Complaint - FCC Auction Proposal
WT Docket No 97-81

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FCC MAIL ROOM

I filed my MAS Applications over five years ago so that I could provide MAS service. It is completely unfair for you to dismiss my applications and arbitrarily change the Lottery process to an Auction. You have held my money for five years. You have been unwilling to discuss this matter or to return my numerous telephone calls - you are a government agency not a dictatorship. If a private business were to do what you are proposing to do, I could sue you for fraud and a host of other violations. In addition to FCC Application fees, I spent considerable amounts on business planning, engineering and legal, an investment that will be lost if my applications are dismissed. It is patently absurd for you, the FCC to claim concern about processing delays related to the holding of a Lottery after you caused a five year delay. Since the lottery list has been prepared - - release the list and hold the Lottery. To say that we should have applied for other Spectrums smacks of Bait and Switch Tactics employed by Scam Artists - - - certainly far below the standard of ethics that we expect from our government agencies. If the FCC wants to license by geographic area, rather than transmitter site, it should be no problem for the FCC to convert my application into a geographic area application for the area that contains my transmitter site. Then the FCC can hold a lottery for my applications that have been pending for over five years and issue geographic licenses. Any other action is a willful abuse of power.

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FCC MAIL ROOM

April 28, 1997

Office of the Secretary
Federal Communications Commission
Washington, DC 20554

Re: **WT Docket No 97-81**

Dear Sir:

We are very disturbed by the FCC's proposed retroactive change in assigning MAS licenses. Our MAS applications for the intended Lottery were filed a year and a half before the passage of the 1993 Auction legislation. We had relied on the FCC's Lottery Policy and incurred significant costs for a small business in order to participate in the MAS Lottery process.

To change directions, as the FCC is proposing, is a slap in the face to the 50,000 MAS applicants for the Lottery Program.

We urgently request that the FCC complete the Lottery process for the MAS licenses and conduct the Lotteries that have been pending for over five years.

Very truly yours,


John J. Flynn
Treasurer

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